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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court previously granted petitions for certiorari to review the Eighth Circuit's earlier decision in this case that, *inter alia*, the Federal Communications Commission ("FCC") lacks "jurisdiction" under §§ 251 and 252 of the Communications Act to adopt regulations interpreting federal statutory pricing requirements that will bind state utility commissions when they arbitrate the terms of the interconnection arrangements that allow new entrants to provide competing *local* telephone services. This petition seeks review of the Eighth Circuit's subsequent issuance of a writ of mandamus and decision holding, on the authority of its prior decision, that the FCC also lacks jurisdiction under § 271 of the Act to apply its interpretation of the federal statutory pricing and public interest requirements when it rules on applications of Bell Companies to provide *long distance* services, and that the FCC must treat state pricing standards as conclusive in ruling on these applications. The question presented is:

Whether the Eighth Circuit properly precluded the FCC from determining whether a Bell Company's charges for access to facilities and services satisfy statutory and competitive standards in ruling on applications to provide long distance services, notwithstanding the explicit statutory directive that the FCC may authorize a Bell Company to provide long distance services only if the FCC "finds" (after giving substantial deference to the views of the Attorney General) that the Bell Company is imposing charges "in accordance with the [pricing] requirements" of §§ 251 and 252(d) of the Act and that the authorization is otherwise "consistent with the public interest, convenience, and necessity."

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the Petitioners' Appendix, *AT&T Corp., et al.* v. *Iowa Utils. Bd., et al.*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3484 (U.S. Jan. 26, 1998) (No. 97-826), see Appendix A, 1a-4a, Appendix D, 73a-79a, and Appendix E, 92a.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

America's Carriers Telecommunication Association ("ACTA") is a national association with over 200 members, the core membership of which is comprised of small- to mid-sized telecommunications carriers providing competitive long distance services on a regional and national basis. ACTA has not issued shares or debt securities to the public. ACTA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Association for Local Telecommunications Services ("ALTS"), is a trade association comprised of companies which construct and operate local telecommunications networks and which use those networks to provide local telecommunications services in competition with incumbent local exchange carriers. ALTS does not have a parent company nor any non-wholly owned subsidiaries.

AT&T Corp. has no parent company. It has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd.
(Hong Kong).

AT&T owns an interest in the following nonpublicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

Cable & Wireless, Inc. is a privately held corporation, a wholly owned subsidiary of Cable and Wireless Holdings, Inc., which, in turn, is a wholly owned subsidiary of Cable and Wireless plc, a publicly traded company. Cable and Wireless plc holds a partial interest in the following subsidiaries and associated undertakings: Hong Kong Telecommunications Limited; Asia Satellite Telecommunications Holdings Ltd.; Cable & Wireless Communications plc; PLD Telecom Inc.; Bezeq - The Israel Telecoms Corporation Limited.

Competitive Telecommunications Association ("CompTel") is an industry association representing the nation's competitive telecommunications carriers, with over 200 members. CompTel has not issued securities to the public, and it does not have any publicly owned parents, subsidiaries, or affiliates.

Cox Communications, Inc. has issued shares and/or debt securities to the public. Cox Enterprises, Inc. holds a

controlling interest in Cox Communications, Inc. and also holds a controlling interest in Cox Radio, Inc., which has issued shares and/or debt securities to the public. Cox Communications, Inc. also has a non-controlling interest, indirectly through intermediaries, in each of the following entities which have issued shares and/or debt securities to the public: At Home Corporation, Flextech PLC, Gemstar, Sprint Spectrum L.P., Sprint Spectrum Finance Corporation, Syntellect, Teleport Communications Group, Inc. and TeleWest PLC.

Excel Telecommunications, Inc. ("Excel") is a wholly owned subsidiary of Excel Telephone, Inc., which, in turn, is wholly owned by Excel Communications, Inc., a publicly traded company. Excel has no nonwholly owned subsidiaries.

General Communications, Inc. ("GCI") is a publicly traded corporation. GCI, Inc., a wholly owned subsidiary of GCI, is an issuer of publicly traded debt securities. MCI owns 19.3% of the equity of GCI and Kearns-Tribune, Corporation owns 0.9% of the equity of GCI.

MCI Telecommunications Corporation ("MCI") is a wholly owned subsidiary of MCI Communications Corporation. MCI has the following nonwholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; and Security Technologies, Inc.

The National Cable Television Association, Inc. ("NCTA") is the principal trade association of the cable television industry in the United States, representing the interest of owners and operators of cable television systems serving over 80 percent of the nation's cable households. Its members also include cable programmers, cable equipment manufacturers and others interested in, or affiliated with, the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 29.

Sprint Corporation has no parent companies. Its only nonwholly owned subsidiary is Central Telephone Company (which in turn has wholly owned subsidiaries).

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 650 resale carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

WorldCom, Inc. ("WorldCom"), a Georgia corporation, is organized for the purpose of engaging in telecommunications and related businesses. WorldCom common stock is traded on The Nasdaq National Market ("NASDAQ") under the symbol "WCOM", and its depositary shares also are traded on NASDAQ under the symbol "WCOMP". On December 31, 1996, a wholly owned subsidiary of WorldCom merged with MFS Communications, Inc. ("MDFA"), a Delaware Corporation. MFS previously was publicly traded on NASDAQ under the symbol "MFST", and its depositary shares were traded on NASDAQ under the symbol "MFSTP". As of March 13, 1998, WorldCom has no parent company or nonwholly owned subsidiary companies.

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The opinion of the Eighth Circuit reviewing the FCC's *First Report and Order*, as amended by the court's order on rehearing, is reported at 120 F.3d 753. The opinion of the Eighth Circuit reviewing the FCC's *Second Report and Order* is reported at 124 F.3d 934. The Eighth Circuit's Writ of Mandamus and its Order on Motions for Enforcement of the Mandate are not yet reported. *See* App. 1a-20a.[1] The FCC's *First Report and Order* and its *Second Report and Order* in its local competition rulemaking are reported at 11 F.C.C.R. 15499 (1996) and 11 F.C.C.R. 19392 (1996), respectively. The FCC's decision in *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 1997 WL 522784, CC Docket No. 97-137 (Aug. 19, 1997) ("*Ameritech Order*") is unreported. See App. 21a-34a.

JURISDICTION

The writ of mandamus and the order on motions for enforcement of the mandate were entered on January 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Telecommunications Act of 1996 are reproduced in Appendix C.

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[1] "App." refers to the appendix to the petition for a writ of certiorari in *Federal Communications Commission, et al.* v. *Iowa Utilities Board, et al.*, which seeks review of the same judgment as this petition.

STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), was enacted to promote and protect competition in all telecommunications markets. The Act enacts a new part of the Communications Act (47 U.S.C. §§ 251-61) that is designed rapidly to open monopoly local telephone markets to competition. In addition, and most pertinent here, it codifies the core provisions of the 1982 Antitrust Decree that broke up the former Bell System and that created and maintained a competitive long distance services market by excluding the divested Bell Operating Companies ("BOCs") so long as they possess bottleneck local telephone monopolies.

In particular, § 271(a) of the Act continues the Decree's prohibition on the BOCs' provision of long distance services. Further, § 271(b) authorizes the FCC to remove the restriction on individual BOCs only if the FCC first finds that the BOC has implemented the provisions of the 1996 Act that open its bottleneck local exchange monopolies to competition and also finds that the BOC's entry into the long distance market is otherwise in the public interest. Section 271 thus fosters the purposes of the 1996 Act by protecting the existing competition in today's long distance market and by giving the BOCs incentives to implement the arrangements that will end the local monopolies that apply to the major metropolitan areas and 80% of the nation's telephones. Petitioners in this case are representatives of long distance carriers and other new local entrants which will benefit from § 271's implementation.

Nothing is more important to the effectuation of the Act's dual purposes than the prices at which the BOCs allow competitors to obtain access to the local bottleneck facilities that the BOCs control. It will prevent the emergence of local competition -- and give illicit advantages to any BOC that

provides long distance service -- if competitors are required to pay prices for these facilities that exceed the economic costs that the BOCs incur when they use the facilities to offer their own services. Accordingly, the 1996 Act adopts new federal statutory pricing standards for access to these facilities. 47 U.S.C. §§ 251(c) & 252(d).

However, in its July 18, 1997 decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997), the Eighth Circuit held that the FCC does not have statutory authority under §§ 251 and 252 of the Act to adopt rules interpreting the federal statutory pricing requirements that will bind state utility commissions when they elect to arbitrate the terms of the interconnection arrangements that allow new entrants to provide competing local telephone services (hereafter, "Section 251 Decision"). The Eighth Circuit concluded that these federal statutory pricing requirements are to be enforced exclusively through after-the-fact review by federal district courts of the States' arbitration decisions. This Court granted certiorari to review that decision, and the case will likely be argued in October 1998. 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141).

In a second *Iowa Utilities Board* decision, issued January 22, 1998, of which this petition seeks review, the Eighth Circuit held that the FCC also lacks authority under § 271 to apply its interpretation of the federal statutory pricing requirements in determining whether BOCs will be permitted to enter the overwhelmingly *interstate* long distance market (hereafter "Section 271 Decision"). The Eighth Circuit further issued a writ of mandamus to the FCC requiring the FCC to treat as conclusive each state utility commission's interpretation and application of those federal requirements when reviewing a BOC application to provide long distance services originating in that State.

This decision has immense national importance. As a result of the judicial decree that broke up the Bell System and prevented the BOCs from entering the long distance market while they retained their bottleneck monopolies over local telephone service, the Bell System monopoly that formerly dominated long distance service in the United States was replaced with a fiercely competitive long distance market that now includes four national facilities-based carriers and hundreds of other regional facilities-based carriers and national resale carriers. Competition has provided long distance consumers with a vast array of new and innovative services and has resulted in long distance prices declining by more than 50%. In light of the importance to the nation of competition in this industry, this Court twice directly reviewed district court decisions under the 1982 Antitrust Decree on an expedited basis,[2] and the Court of Appeals for the D.C. Circuit issued numerous published opinions construing and enforcing its terms.[3]

The importance to competition of excluding the BOCs from the long distance market until they lose their local

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[2] *See Maryland v. United States*, 460 U.S. 1001 (1983) (mem.); *California v. United States*, 464 U.S. 1013 (1983) (mem).

[3] *See, e.g., United States v. Western Elec. Co.*, 46 F.3d 1198 (D.C. Cir. 1995); *id.*, 12 F.3d 225 (D.C. Cir. 1993); *id.*, 993 F.2d 1572 (D.C. Cir. 1993); *id.*, 969 F.2d 1231 (D.C. Cir. 1992); *id.*, 907 F.2d 1205 (D.C. Cir. 1990); *id.*, 907 F.2d 160 (D.C. Cir. 1990); *id.*, 900 F.2d 283 (D.C. Cir. 1990); *id.*, 894 F.2d 1387 (D.C. Cir. 1990); *id.*, 894 F.2d 430 (D.C. Cir. 1990); *id.*, 846 F.2d 1422 (D.C. Cir. 1988); *id.*, 797 F.2d 1082 (D.C. Cir. 1986).

monopolies has thus long been established as a matter of national policy. That principle is now codified in the 1996 Act as a central component of the nation's communications law in order to protect this competition and to promote competition in local services as well. The Eighth Circuit's Section 271 Decision, however, greatly threatens that critical national policy.

The Eighth Circuit premised its Section 271 Decision entirely upon the correctness of its Section 251 Decision. Accordingly, if this Court reverses the Section 251 Decision, that reversal will eliminate any basis for the Section 271 Decision, and the writ of mandamus will have to be vacated. This petition should, however, be granted rather than held, and scheduled to be argued and decided together with the Section 251 Decision to which it so closely relates. The two decisions were issued in the same case, and the Eighth Circuit believed that the Section 271 Decision merely implemented its earlier Section 251 Decision.

As we detail *infra*, even if the Eighth Circuit's Section 251 Decision were correct and this Court were to affirm it, the subsequent decision on § 271 would still be erroneous and should be reviewed and reversed. But if the Court holds this case and waits until it issues its decision on the § 251 issues before granting certiorari, that could create great difficulties for the FCC and the industry. Numerous § 271 applications are expected to be filed by BOCs over the next 12 months and the 1996 Act requires the FCC to decide each within 90 days of the date the application is filed. *See* 47 U.S.C. § 271(d)(3). That means that, if the § 271 issue is not decided at the same time as the § 251 issues, it likely would have to be addressed by the Court initially through emergency stay requests rather than full and orderly briefing. Moreover, because the issues are so closely related, the parties will be briefing much of the § 271 issue in their merits briefs on the Section 251 Decision in any

event. For all these reasons, the most efficient and logical way to review *Iowa Utilities Board* is to grant this petition and consider the entire case at one time.

1. *Local Telephone Monopolies and Pertinent Historic State and Federal Regulation.* Historically, local telephone services in the United States were provided by franchised local monopolists, which are known as incumbent local exchange carriers or LECs. The BOCs are the LECs that serve more than 80% of the nation's telephones and virtually all of the nation's major metropolitan areas, and that were, until January 1, 1984, affiliates of AT&T. In addition to providing local exchange services within local calling areas, the BOCs' local networks are essential facilities to which long distance carriers must have access in order to carry long distance calls between those calling areas. Thus, AT&T, MCI, Sprint, and other long distance carriers use BOC facilities to begin and terminate their long distance services. These are known as exchange access services.

Regulation of telephone service has always been divided between state and federal authorities. Prior to 1996, § 2(b) of the Communications Act (47 U.S.C. § 152(b)) generally left States with exclusive jurisdiction over purely intrastate communications services, so States regulated rates for local exchange services and intrastate long distance services. However, the FCC has always regulated interstate long distance services, including exchange access services for interstate long distance calls, under §§ 2(a) and 201-205 of the Communications Act. 47 U.S.C. §§ 152(a), 201-205.

Local telephone service has historically been considered a natural monopoly, *see United States v. Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990), and the FCC and

the States formerly prohibited competition with BOCs' local services. But the FCC sought to foster competition in the provision of interstate long distance services by imposing upon BOCs and their long distance affiliates a series of duties, including requirements that BOCs charge just, reasonable, and nondiscriminatory rates for exchange access services.

Because these FCC regulations were insufficient, the United States thereafter filed a suit under the Sherman Act against the Bell System, charging that the BOCs had used their local monopolies to favor their then-affiliate AT&T and to impede long distance competition. Many of the Justice Department's claims alleged anticompetitive pricing practices by the Bell System, such as engaging in "price squeezes" against long distance competitors by charging those competitors prices for exchange access services substantially in excess of their economic cost while permitting the Bell System's long distance affiliate to use those facilities at economic cost. *See United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1355, 1357, 1364-1370 (D.D.C. 1981). This suit was settled in 1982 when the Bell System consented to a Decree (the Modification of Final Judgment or "MFJ") that (1) required the divestiture of the BOCs, (2) precluded the BOCs from providing either interstate or intrastate long distance services so long as they had local monopolies and (3) required the BOCs to provide interstate and intrastate exchange access under nondiscriminatory terms and conditions at cost-based rates. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 140-43 (D.D.C. 1982), *aff'd sub. nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The premise of the MFJ was that any BOC that "enjoyed a monopoly on local calls would ineluctably leverage that bottleneck control in the interexchange (long distance) market" to harm long distance competition and consumers in a variety of

ways. *United States v. Western Elec. Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992) (citation omitted). For example, a BOC could discriminate against long distance competitors in the pricing and provisioning of essential exchange access services, and could also monopolize the long distance business of those customers who desire to obtain local exchange services and long distance services from a single source ("one-stop shopping"). The federal court thus held that it was in the "public interest" to enjoin the BOCs from providing long distance services until such time as changes in technology or regulation were determined by the court to have "eliminate[d] the [BOCs'] local exchange monopoly" or otherwise deprived them of the ability to engage in this leveraging. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. at 194-95.

Over 30 States intervened and opposed entry of the MFJ on jurisdictional grounds. They asserted that because the MFJ's requirements applied not only to interstate services but also to intrastate services, the MFJ encroached upon the States' exclusive jurisdiction over intrastate telecommunications services under § 2(b) of the Communications Act. These States thus claimed both that the MFJ's requirements could not be implemented without their prior approval and that they would also have the authority to undo its requirements after entry of the decree by ordering BOCs to behave inconsistently with the MFJ's requirements with respect to intrastate services. The district court rejected these claims, holding that § 2(b) of the Communications Act was irrelevant because the court was acting under the Sherman Act, which is fully applicable to intrastate communications services because they affect interstate commerce. This Court affirmed. *See United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

Under the MFJ, States continued to control whether and on what terms other carriers would be permitted to compete with the BOCs in the provision of intrastate exchange and exchange access services, and the FCC exercised similar authority over interstate access services. At the same time, federal courts, in deciding whether to authorize BOCs to provide long distance services under this standard, were required to determine the sufficiency of those state and federal regulations in establishing competitive and other safeguards that would prevent the harms that BOC entry into long distance would otherwise cause. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 544-546, 567-579 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990). Because the issues arose under federal antitrust standards, courts gave substantial deference to the Department of Justice on these questions, but no deference to the views of the FCC or state regulators. *See United States v. Western Elec. Co.*, 900 F.2d at 297-98.

Moreover, even if a BOC had received authorization to provide long distance services from the court administering the MFJ, the BOC could not lawfully have provided interstate long distance services unless and until the FCC had issued a "certificate of public convenience and necessity" under § 214 of the Act. That certificate could not be issued unless the FCC found that BOC entry would be consistent with the public interest. The FCC was also authorized to impose conditions to assure protection of that interest. 47 U.S.C. §§ 214(a) & (c).

2. *The 1996 Act.* In the 1996 Act, Congress sought to transform the monopoly local telephone markets into competitive markets. To that end, Congress not only preempted all state-law barriers to entry (§ 253), but further imposed affirmative duties on the BOCs to allow new entrants

to use the BOCs' essential and other facilities at cost-based rates to provide competitive service. *See* §§ 251-252. The Act provides that a BOC must enter into detailed "interconnection agreements" with new entrants setting the prices and other terms and conditions under which the new entrants may interconnect with the BOC's network (§ 251(c)(2)), obtain access to the BOC's network elements (§ 251(c)(3)), and resell the BOC's services (§ 251(c)(4)). The Act further sets federal pricing standards governing the charges the BOCs may impose on new entrants pursuing each of these three modes of entry. The FCC was directed to adopt regulations implementing the 1996 Act's new requirements within six months of the Act's enactment (§ 251(d)(1)). Under the Act, state regulatory commissions may assume the task of applying those regulations and the statute's provisions to resolve disputes concerning the terms of these interconnection agreements (§ 252), in which case their decisions are reviewable in federal district courts (§ 252(e)(6)), or they may choose to leave that responsibility to the FCC (§ 252(e)(5)), in which case its decisions are reviewable in the court of appeals (§ 402(a)).

Congress also codified in the Act the core provision of the MFJ's long distance restrictions on BOCs by generally prohibiting a BOC from providing long distance services to customers in States where the BOC has a local exchange monopoly. 47 U.S.C. § 271(a). Section 271 further provides, however, that the FCC can grant a BOC this long distance authority for service originating in a particular State if the FCC makes four specific findings. Two are pertinent here: First, it must find that the BOC has fully implemented the items on the competitive checklist and opened the local market in that State to competition by providing to competitors, among other things, access to unbundled network elements, interconnection, and wholesale services for resale "in accordance with the requirements of sections 251(c)[] and 252(d)[]" of the Act. 47

U.S.C. §§ 271(d)(3)(A), (c)(2)(B)(i) & (c)(2)(B)(ii). Second, the FCC must "find" that the authorization is "consistent with the public interest, convenience and necessity." *Id.* § 271(d)(3)(C). With respect to each of these findings, the FCC is required to give "substantial weight" to the Justice Department's evaluation (*see* § 271(d)(2)(A)), but while it must "consult" with the pertinent state commission to "verify" whether the BOC is in compliance with the checklist, the Act includes no similar requirement of deference to the state commission (*see* § 271(d)(2)(B)). Moreover, unlike most FCC orders, which can be reviewed either by the D.C. Circuit or the circuit in which the petitioner resides, *id.* § 402(a), Congress provided that the D.C. Circuit, with its years of experience under the MFJ, would have exclusive jurisdiction over all FCC § 271 orders. *Id.* § 402(b)(6) & (9).

On August 8, 1996, the FCC issued its *First Report and Order*, adopting rules that implement the local competition provisions of the 1996 Act, including the pricing requirements that §§ 251 and 252 impose upon BOCs. First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996). The FCC determined that the price for interconnection and access to unbundled network elements should be based on "forward-looking" costs, also known as total element long-run incremental costs ("TELRIC"), rather than on the "embedded" costs reflected on ratemaking accounting books. *Id.*, ¶ 620. The FCC found that forward-looking costs are the costs the LECs themselves incur when they use these facilities to provide services, and that it would be anticompetitive for the LECs to charge their competitors under an "embedded cost" standard where such prices would be higher. *Id.*, ¶¶ 704-707. The FCC also specified other pricing rules for the resale of local services. *Id.*, ¶¶ 878-934.

The FCC held that these pricing and other rules would bind state commissions in establishing interconnection agreements. *Id.*, ¶¶ 111-117. Further, the FCC stated that because many of these rules constituted the FCC's interpretation of substantive requirements imposed by §§ 251 and 252 that had to be satisfied as part of the competitive checklist under § 271, these rules also established the FCC's views of the requirements of some items of that checklist and would "assist BOCs in determining what steps must be taken to meet [those] requirements." *Id.*, ¶ 57.

3. *The Eighth Circuit's Section 251 Decision.* Petitions for review of the *First Report and Order* were consolidated in the Eighth Circuit pursuant to 28 U.S.C. § 2112. The Eighth Circuit initially stayed and ultimately vacated the pricing rules that the FCC adopted to implement §§ 251 and 252.

The Eighth Circuit acknowledged that §§ 251 and 252 imposed federal pricing requirements that unambiguously apply to local telephone facilities and services that it found to be intrastate. But the Eighth Circuit concluded that §§ 251 and 252 did not give the FCC any authority to interpret or apply those requirements. Although other FCC regulations under those sections were determined to bind the States in arbitrations, the Eighth Circuit held that the "[p]lain [l]anguage" of §§ 251 and 252 gave the States and not the FCC authority to interpret the Act's pricing standards in arbitrations over interconnection agreements. *Iowa Utils. Bd.* v. *FCC*, 120 F.3d at 794-796. The Eighth Circuit further held that, if the matter were ambiguous, § 2(b) would require that the issue of statutory authority be resolved in favor of the States and against the FCC because, it found, the interconnection agreements were intrastate matters. *Id.* at 796-800.

By contrast, the FCC's conclusion in the First Report and Order (¶ 57) that it has authority to interpret these requirements in § 271 proceedings was not challenged by either the BOCs or the state commissions before the Eighth Circuit. To the contrary, the BOCs expressly argued that the FCC would apply its interpretation of the federal statutory pricing requirements in § 271 proceedings even if it were held to lack this authority under §§ 251 and 252. In particular, it was on this basis that the BOCs argued that the Eighth Circuit would be required to review the substance of the FCC's pricing rules even if it held that there was no authority under §§ 251 and 252 to issue those rules. *See, e.g.*, BOC/GTE Brief to Eighth Circuit at 31. The Eighth Circuit did not address § 271 in its Section 251 Decision.

4. *The FCC's Ameritech Order*. On August 19, 1997, one month after the Eighth Circuit issued the Section 251 Decision, the FCC released its *Ameritech Order*. In that order, the FCC denied Ameritech's § 271 application for long distance authority in Michigan because Ameritech had failed to open its local exchange market to competition in compliance with the competitive checklist in at least three respects. But the FCC went on to provide guidance on other issues that had been raised, two of which are pertinent here.

First, the FCC stated that, in discharging its duty to determine whether a BOC is providing access and interconnection "in accordance with the [pricing] requirements of sections 251(c) and 252(d)," the FCC would apply its interpretation of those requirements unless and until they are construed differently by the federal courts. *Ameritech Order*, ¶¶ 284-85 (App. 24a-26a). In this regard, the FCC noted that the Eighth Circuit's Section 251 Decision did not review the merits of the FCC's pricing rules, and that the federal approach

to pricing had generally been adopted by the vast majority of States. *Id.* ¶ 283 (App. 23a-24a).

The FCC explained that the Act's requirement that BOCs charge cost-based prices for access to local facilities and services would ultimately have a "uniform meaning nationwide." *Id.*, ¶ 286 (App. 26a). Because of the Eighth Circuit's Section 251 Decision, however, the meaning of the statutory requirement of cost-based prices "will be determined through *de novo* review of State [commission] determinations by the federal district courts. . . . The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means." *Id.*, ¶ 284. The FCC observed that while this issue "wends it[s] way through the courts" the Commission must necessarily rule on § 271 applications, and in doing so, has a statutory obligation to determine within 90 days whether a BOC seeking long distance authorization is providing access to local facilities and services at cost-based prices. *Id.*, ¶ 285. In fulfilling its obligation, therefore, the FCC determined that it would uniformly apply its interpretation of the pricing requirements in § 271 proceedings unless and until that interpretation is reversed by the federal courts.

Second, the FCC declared that, in any event, it had the authority and responsibility to consider BOCs' pricing practices and commitments in deciding whether granting long distance authority is "consistent with the public interest" under § 271(d)(3)(C). *Id.* ¶ 288 (App. 28a). It noted that the prices the BOCs charge new entrants in local exchange markets for essential facilities and services will profoundly affect whether their entry in the long distance market would harm competition, and thus defeat the public interest. *Id.* ¶ 287 (App. 27a) (local markets are not open to competition "if the prices for interconnection and unbundled elements do not permit efficient

entry. That would be the case, for example, if such prices included embedded costs").

5. *The Eighth Circuit's January 22, 1998 Decision and Writ of Mandamus.* After the FCC issued its denial of Ameritech's § 271 application in Michigan, state regulatory commissions and BOCs filed motions in the Eighth Circuit which asserted that the *Ameritech Order* constituted a violation of the court's mandate, and requested that the court issue a writ of mandamus. The FCC and its supporting intervenors opposed these motions on four grounds: First, the Eighth Circuit lacked jurisdiction to review the FCC's § 271 decision, because such review is within the exclusive jurisdiction of the D.C. Circuit under § 402(b) of the 1996 Act. Second, issuance of a writ of mandamus was entirely inappropriate because any party aggrieved by the *Ameritech Order* had an immediate right of appeal to the D. C. Circuit. Third, the court's Section 251 Decision did not address, much less decide, whether the FCC has statutory authority to adopt federal pricing rules under § 271 and that issue thus could not have been within the court's mandate. Fourth, even assuming *arguendo* that the FCC lacks authority to adopt federal pricing rules that bind state commissions in establishing the terms of interconnection agreements for local exchange facilities and services under §§ 251 and 252, the FCC plainly has authority to apply its interpretation of federal statutory pricing requirements in § 271 proceedings to grant authorization to provide long distance services that are overwhelmingly interstate.

The Eighth Circuit rejected these arguments. It stated that a "core holding[]" of its July 18, 1997 decision was that the FCC has no jurisdiction to issue pricing rules "for interconnection, unbundled access, resale, and transport and termination of local telecommunication services under section 252(d) of the [Act]." App. 4a. Despite the fact that the

Ameritech Order addressed a § 271 application for long distance authorization, the court concluded that the FCC's assertion that it would apply its interpretation of federal statutory pricing requirements in that distinct context "does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do." *Id.* at 8a. Finally, the court concluded that its issuance of an order forbidding the FCC to apply its interpretation of federal statutory pricing requirements in § 271 proceedings did not infringe upon the D.C. Circuit's exclusive jurisdiction to review the FCC's § 271 decisions. The court explained that it would "leave the FCC's Ameritech Order untouched," *id.* at 19a, apparently believing that if it only forbade the FCC from applying its interpretation of federal statutory pricing requirements in *future* § 271 proceedings, it was not intruding on the D.C. Circuit's domain.

6. *This Court Grants Certiorari.* In November 1997, the FCC and petitioners here filed a petition for certiorari seeking review of the Eighth Circuit's Section 251 Decision. This Court expedited its consideration of the petition for certiorari, and, on January 23, 1998, granted eight petitions for review of that decision.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S SECTION 271 DECISION INCORRECTLY DECIDED AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW.

The Section 271 Decision is of enormous significance. The BOCs have been barred for nearly two decades from providing long distance services to their local exchange customers while they retain their local exchange monopolies, and that prohibition has transformed the long distance industry

from a monopoly to a vigorously competitive market. Under the Eighth Circuit's decision, however, that historic progress could be reversed. Its decision could require the FCC to grant long distance authorization to BOCs which, in the FCC's judgment, charge new entrants anticompetitive prices for access to essential facilities and services that preclude local competition, that ensure the continuation of the BOCs' local monopolies, and that would enable the BOCs to use those monopolies to impede long distance competition.

The Eighth Circuit's decision is plainly wrong. As a threshold matter, the issuance of a writ of mandamus was both inappropriate and beyond the Eighth Circuit's jurisdiction.[4] On the merits, the decision is contrary to the terms and purposes of the 1996 Act.

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[4] The Communications Act vests exclusive jurisdiction over appeals of the FCC's § 271 decisions, including the *Ameritech Order*, in the D.C. Circuit. *See* 47 U.S.C. §§ 402(b)(6,9). It is settled law that (1) mandamus may not be issued where an adequate remedy is available through a normal appeal *(see, e.g., Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943)), and (2) the All Writs Act bars a court from issuing a writ of mandamus to an agency or court whose final decision is properly reviewable only in another circuit (*see* 16 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3932, at 476-7 (2d ed. 1996)). *See supra* p. 15. Further, the Eighth Circuit did not expressly or impliedly decide the separate issues arising under § 271 in the Section 251 Decision, and the parties to that case had all assumed that the FCC would exercise the precise authority that the Section 271 Decision erroneously concluded had been challenged and invalidated in the Section 251 Decision.

Section 271 addresses a matter that States have never had jurisdiction to determine: whether and under what conditions BOCs will be allowed to provide long distance services that are overwhelmingly interstate. As is set forth *supra*, prior to the 1996 Act, BOCs were barred from providing such services under the MFJ and § 214 of the Communications Act. In § 271(a) of the 1996 Act, Congress codified the MFJ's long distance restrictions by prohibiting BOCs with local exchange monopolies from selling long distance services to their local exchange customers.

The 1996 Act provides that the FCC may grant long distance authority to a BOC if it makes certain findings, two of which are pertinent here. First, it must find that the BOC provides access and interconnection "in accordance with the [pricing] requirements of sections 251(c)[] and 252(d)[]." *See* 47 U.S.C. § 271(c)(2)(B). In addition, it must determine whether a BOC's long distance entry would harm long distance competition and be contrary to the "public interest." *See* 47 U.S.C. § 271(d)(3)(C). Each of these determinations is expressly and exclusively assigned to the FCC. See § 271(d)(3) ("The Commission shall not approve the authorization requested in an application . . . unless it finds that" these statutory requirements have been satisfied (emphasis added)). The FCC's conclusion that this provision requires it to make its own findings that the BOC has complied with the Act's pricing standards and is not charging prices that would render its entry into the long distance market contrary to the public interest is thus compelled by the plain language of the Act.[5]

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[5] That conclusion is in any event a reasonable one. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Mississippi Power & Light*

(continued...)

The Eighth Circuit, however, did not understand § 271(d)(3) to require the FCC to make its own finding whether the prices satisfy the statutory standards. The Eighth Circuit instead concluded that the checklist does "nothing more than incorporate by reference" the pricing requirements of §§ 251 and 252, which that court had previously held were to be interpreted by the States, without regard to FCC regulations, when interconnection agreements are arbitrated. App. 10a. Under the Eighth Circuit's view, § 271(d)(3) therefore requires only that the FCC confirm with the state commission that the BOC is actually charging whatever prices the state commission has approved. Similarly, the D.C. Circuit's only role in reviewing the FCC's approval of a § 271 application is to see if the FCC actually checked with the State.

The Eighth Circuit's reading of § 271 is inconsistent with its terms. Section 271 does not merely incorporate § 252 by reference, but also contains the unambiguous grant of authority to the FCC that the Eighth Circuit's Section 251 Decision (erroneously) found lacking with respect to arbitration of interconnection agreements. As noted, § 271 requires the FCC itself to "find" whether a BOC has opened the local exchange market to competition by, *inter alia*, providing access to facilities and services at prices that comply with the statutory standards in §§ 251 and 252. Section 271 contemplates that the FCC will "consult" with state commissions to "verify" BOC compliance with the statutory requirements, including proper pricing. *See* § 271(d)(2)(B). But § 271 makes clear that while

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[5] (...continued)
Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring in the judgment) (an agency's determination of the scope of its authority is entitled to *Chevron* deference).

the FCC is required to give substantial deference to the views of the Justice Department, it is *not* required to give any particular deference to state commission determinations in § 271 proceedings. *Compare* § 271(d)(2)(A) (requiring the FCC to give "substantial weight" to the Department of Justice's recommendation on § 271 applications) *with* § 271(d)(2)(B) (omitting any requirement that the FCC give any specified weight to state determinations). Indeed, it would be impossible for the FCC to give "substantial weight" to the Justice Department's recommendations if it were simultaneously required to treat state determinations on particular checklist items as conclusive.[6]

The Eighth Circuit apparently thought it would be anomalous to hold that a State may adopt rules relating to local services that it thinks sufficient to enable a BOC to enter the long distance market without significant risk of competitive harm and that the FCC could nonetheless disagree and decline to authorize such entry. But that is precisely the situation that applied under the MFJ, on which § 271 was modeled, when the federal courts acting under the Sherman Act were required to

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[6] Notably, the language of § 271 in requiring an FCC finding of compliance is virtually identical to the language of the provision authorizing federal district courts to review state commission arbitration decisions. *Compare* § 271(c)(2)(B)(ii) (FCC must find that BOC is offering access to network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)") *with* § 252(e)(6) (federal district courts must determine whether the state commission's determination "meets the requirements of section 251 and . . . section [252]"). Neither the Eighth Circuit nor any party has ever suggested, however, that Section 252(e)(6) requires federal district courts to treat state determinations as conclusive.

assess whether state regulation was sufficient to justify BOC long distance entry. *See supra* pp. 8-9.

No FCC deference to state commission interpretations of the Act's pricing requirements could feasibly be given in any event. The 50 state commissions will undoubtedly interpret the Act differently in some respects. As the FCC observed in the *Ameritech Order*, however, federal statutes are presumed to have a uniform meaning, and there ultimately can be only one definition, not multiple definitions, of the statutory requirement that prices be cost-based. ¶ 286 (App. 26a). Under the Eighth Circuit's Section 251 Decision, that uniform definition will emerge as federal district courts review the state commission interpretations of the pricing requirements, and as those district court decisions are then reviewed by courts of appeals and potentially this Court -- a process that will take considerable time. In the meantime, the FCC is required to apply its best interpretation of those provisions when it acts within its authority under § 271, just as the States must apply their best interpretations in acting within what the Eighth Circuit held to be their sphere of authority in establishing interconnection agreements. And because the FCC interpretation, just like the States' interpretations, is subject to judicial review, the definitive meaning of these provisions will still ultimately be resolved by the courts (rather than by either federal or state administrative agencies).

The Eighth Circuit's contrary view would lead to absurd results. There would be no uniformity in the FCC's application of § 271's entry test, because the FCC would be required to treat each state commission's interpretation of § 252's pricing standards as conclusive for that State, regardless of how that interpretation might differ from other state commission interpretations in States for which other § 271 applications are pending. Further, every time a federal district court reversed a

state commission's pricing determination, a BOC that had received long distance authority could have that authority revoked for then failing to meet the checklist. *See* § 271(d)(6) (FCC revocation authority "[i]f at any time after the approval of an application . . . the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval").

Thus, the Eighth Circuit was simply wrong in concluding that an FCC interpretation of the statutory pricing requirements in the course of deciding § 271 applications is inconsistent with the authority over pricing that it had previously held belonged to state commissions under §§ 251 and 252. Both state and FCC interpretations of the statutory pricing standards will be reviewed by the courts, which will establish the definitive meaning of the statute. Moreover, even in the meantime, an FCC decision rejecting a long distance application on the ground that a BOC's prices do not satisfy the requirements of § 251(c) or 252(d) would have no effect on the BOC's ability to continue to charge those same prices or on the State's pricing determinations. It would simply preclude the BOC from providing long distance services, a decision § 271 expressly empowers the FCC to make.

Furthermore, even apart from the FCC's responsibility to make independent findings of checklist compliance, § 271 separately requires the FCC broadly to determine whether the grant of a BOC's application would be contrary to the "public interest." *See* 47 U.S.C. § 271(d)(3)(C). As the FCC has found, the pricing of BOC facilities and services has "profound implications" for "competition in the long distance market." App. 27a (¶ 287). This Court has held that competitive considerations are one of the required elements of any public

interest inquiry,[7] and the Act thus not only permits, but requires, the FCC to consider whether a BOC's entry would harm competition in the long distance market. But under the Eighth Circuit's view, essential aspects of the FCC's public interest determination are ceded to the States, and the FCC is thus precluded from rejecting a BOC application *even if* it concludes that the BOC is charging prices for interconnection, network elements, and resale that will preclude competitive entry and thus enable the BOC both to maintain its local monopoly and to leverage that monopoly into the long distance market so as to harm long distance consumers. That result finds no support in the Act, and would defeat its central objectives.

II. THIS CASE SHOULD BE CONSIDERED TOGETHER WITH THE OTHER *IOWA UTILITIES BOARD* DECISIONS ON WHICH CERTIORARI HAS ALREADY BEEN GRANTED.

The Section 271 Decision should be reviewed and considered together with the Section 251 Decision on which certiorari has already been granted. Even if the Court affirms the Section 251 Decision, the Eighth Circuit's extension of that holding to limit the FCC's § 271 authority over interstate markets will remain both unwarranted as a matter of law and profoundly disruptive to the continued implementation of

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[7] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) ("[t]here can be no doubt that competition is a relevant factor in weighing the public interest" under the Communications Act); *Denver & Rio Grande W. R.R. v. United States*, 387 U.S. 485, 492 (1967) ("this Court ha[s] read terms such as 'public interest' broadly, to require consideration of all important consequences including anticompetitive effects").

central provisions of the 1996 Act. Considerations of practicality and efficiency militate strongly in favor of simultaneous review of both decisions.

If the two decisions are not reviewed at the same time, that will create extraordinary difficulties for the FCC and the industry in the interim. Numerous § 271 applications will be filed by the BOCs over the course of the next 12 months. Because Congress wished to ensure expedited FCC decisionmaking on § 271 matters, the FCC is statutorily required to issue a final decision on each § 271 application within 90 days of its filing. *See* § 271(d)(3). The four BOC applications that have been filed to date have each been rejected for deficiencies unrelated to pricing,[8] and in light of the market conditions that currently prevail, BOC applications in the very near future are similarly unlikely to be held to satisfy the non-pricing requirements of the Act. However, that may well

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[8] *See Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Oklahoma*, 12 F.C.C.R. 8685 (1997); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-region InterLATA Services in Michigan*, CC Docket No. 97-137 (Aug. 19, 1997); *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, 1997 W.L. 799081, CC Docket No. 97-208 (FCC Dec. 24, 1997); *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana*, 1998 W.L. 42491, CC Docket No. 97-231 (FCC Feb. 4, 1998).

change by early 1999 and pricing issues could then become dispositive. As a result, if the Section 271 Decision is not considered together with the Section 251 Decision, the § 271 issue may nonetheless have to be considered by the Court, and provisionally decided, in the rushed and abbreviated context of emergency stay requests.[9] This Court's interest in orderly decisionmaking would not be best served by such a process.

By contrast, consideration of the § 271 and § 251 issues at the same time will substantially aid the Court in its consideration of each. The two decisions arise from a single case, and the court of appeals viewed those decisions as so interrelated that it believed its holding in one conclusively dictated the outcome of the other. In the Eighth Circuit's view, the Section 271 Decision merely implemented its Section 251 Decision.

That the parties have been forced to file two separate petitions rather than one is purely an accident of timing. The Eighth Circuit had the mandamus matter under consideration for five months before it issued the writ on January 22, 1998. The urgency of resolving the issues raised in the Section 251 Decision required petitioners to file in November 1997 their petitions for certiorari covering the Eighth Circuit's initial decision (issued on July 18, 1997) and its decision on rehearing

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[9] Such requests could take the form of motions to this Court by the undersigned petitioners to stay the Eighth Circuit's Section 271 Decision. In addition, other petitioners might file motions in the D.C. Circuit seeking to stay any decision by the FCC that granted an application but failed to consider pricing. And whether such a stay were granted or denied by the D.C. Circuit, the losing party would be nearly certain to seek emergency relief from this Court.

(issued on October 14, 1998).[10] Had the mandamus decision issued sooner, petitioners could and would have sought certiorari on the entire case in a single petition, and there is no reason to believe the Court would have held the § 271 issue while granting certiorari on all remaining issues. Given that the § 271 issue can still be fully briefed in time to be argued together with review of the Section 251 Decision, this accident of timing need not and should not influence the Court's decision on how it can most efficiently structure its consideration of *Iowa Utilities Board*.

That is especially the case in light of the fact that the § 271 issue will necessarily be before the Court in some form in its review of the Section 251 Decision even if this petition is held. In particular, regardless of whether this case is granted now, petitioners' merits brief in the § 251 case will directly address § 271 and the Eighth Circuit's mandamus decision because they graphically illustrate one of the reasons why the Eighth Circuit's Section 251 Decision was wrong. And because the Court will therefore be considering the § 271 issues in any event when it considers the Section 251 Decision, it will add no significant additional complexity or burden to the case if the two Eighth Circuit decisions are considered together.

Specifically, petitioners will argue that it would be extraordinary to conclude that the FCC, which is charged with deciding BOC applications to provide long distance service through the application of both detailed checklist requirements that expressly include pricing and a separate and broad "public interest" standard, has been divested by Congress of any

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[10] Indeed, the time for petitioning for certiorari on the earlier *Iowa Utilities Board* decisions had expired by the time the Section 271 Decision issued.

obligation or ability, when exercising that responsibility, to consider the prices BOCs charge for access to their monopoly facilities. Under that view, the FCC could be required to permit BOC entry into the long distance market even if it determined that the BOC's prices would completely foreclose competition with its local monopoly and enable it to leverage that monopoly to gain anticompetitive advantages, and harm consumers, in the long distance market.

But the Eighth Circuit felt driven to that unnatural result because it believed that any other outcome would be irreconcilable with the core holding of its Section 251 Decision. While we believe that the FCC's authority under § 271 can and should be upheld regardless of what the Court determines about the FCC's authority under § 251, that § 271 authority is also powerful evidence that Congress could not have believed, as the Eighth Circuit held, that §§ 251 and 252 deprived the FCC of the power to issue federal pricing standards that would bind state commissions fashioning interconnection agreements. In particular, we will argue, because the FCC will in any event have to construe the federal pricing requirements in implementing § 271, it is highly unlikely that Congress would have precluded it from construing the same requirements when issuing regulations under § 251.

The BOCs and state commissions, of course, take the opposite position. In accord with the Eighth Circuit, they contend that the decision that the FCC has no pricing jurisdiction under § 251 necessarily dictates that the FCC cannot interpret the federal statutory pricing requirements even when applying § 271 to regulate entry into interstate markets. But even if that were so, it would only underscore the importance of addressing the Section 251 Decision and the Section 271 Decision together, so that the Court will have

before it concretely, and thus be able to consider, all necessary implications of any decision it reaches on § 251.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and this case should be reviewed together with the *Iowa Utilities Board* cases already granted.

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In The

Supreme Court of the United States

October Term, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit was correct in enforcing its mandate and in ordering the Federal Communications Commission (FCC) to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271, as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997) requires?

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16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1996) 9

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STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act) was designed to encourage competition in the local telephone industry by requiring the local exchange carriers to provide competitors access to their facilities. The Act gave state regulatory commissions the authority to set prices for such access. 47 U.S.C. section 252(c)(2).[1] Section 252(d) lists the pricing standards that state commissions must apply to determine appropriate rates. 47 U.S.C. section 252(d)(1)(A)(i).

Following the signing of the Act, the FCC adopted extensive pricing regulations for interconnection, unbundled access, resale and transport and termination of local telecommunications services. *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First R&O)*, 11 F.C.C.R. 15499 (1996). In particular, the FCC regulations required state commissions to employ the "total element long run incremental cost" (TELRIC) method for determining the rates "based on the cost" required by section 252(d)(1)(A)(i). *First R & O* at ¶ 672. Twenty-eight states and the National Association of Regulatory Utility Commissioners sought review and relief from these pricing regulations.

In its July 18, 1997, opinion reviewing the FCC's regulations, the Eighth Circuit Court of Appeals

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[1] In addition, Section 2(b) of the 1934 Communications Act, 47 U.S.C. § 152 (b), continued to prohibit the FCC from regulating intrastate ratemaking matters reserved to the states.

concluded "that the FCC exceeded its jurisdiction in promulgating the pricing rules."[2] 120 F.3d at 794. It concluded "that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." 120 F.3d at 796. The Court further determined the FCC could not use its review or enforcement authority under 47 U.S.C. section 208 to review and redetermine state commission determinations of the just and reasonable rates that incumbent local exchange carriers can charge their competitors. 120 F.3d at 804. To do so would "undermine" the jurisdictional decision. *Id.*

Scarcely one month after the Eighth Circuit issued its ruling, the FCC attempted to utilize its authority under section 271 to evade the jurisdictional ruling. The FCC conditioned entry of the Bell Operating Companies (BOCs) into the long distance market on compliance with the FCC-mandated pricing method recently vacated as beyond the FCC's jurisdiction by the Eighth Circuit. *Application of Ameritech Michigan Pursuant to Section 217 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan (Ameritech Order)*, CC Docket No. 97-298, FCC No. 97-298 (Aug. 19, 1997). Pet. App. 21a-32a.[3] Section 271 grants the FCC the

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[2] Petitions for certiorari of this decision, as well as the Court's decision reviewing the Second Report and Order were granted on January 23, 1998.

[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Federal Communications Commission, et al. v. Iowa Utilities Board, et al., No. 97-1519.*

authority to approve entry by the BOCs into the inter-LATA long distance market.[4] To enter, the FCC must find the BOC meets a 14-point "competitive checklist" created by section 271(c)(2)(B) and entrance must be consistent with the public interest. Included in the "checklist" is the requirement that BOCs demonstrate interconnection and access in accordance with sections 251(c)(2) and (3) and 252(d)(1).[5]

In denying Ameritech's application for interLATA entry in the state of Michigan, the FCC took the opportunity to provide guidance concerning the public interest standard that it would apply in evaluating future section 271 applications. *Ameritech Order* at ¶ 6. In this ostensibly advisory portion of the order, the FCC stated that for a BOC to show it has made available "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)," the first checklist requirement,[6] the BOC must demonstrate use of the FCC's version of the TELRIC pricing methodology. Pet. App. 28a. The FCC also stated that as a condition of authorization it would require continuing compliance with the TELRIC pricing requirements to provide in-region interLATA services. Pet. App. 33a-34a.

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[4] After consultation with the states and the Department of Justice, the FCC may approve entry if the BOC has met certain conditions designed to ensure a competitive environment exists in a state. *See* 47 U.S.C. § 271(c)(2)(B).

[5] Section 252(d)(1) contains the pricing standard to be applied by State commissions in determining just and reasonable rates for interconnection.

[6] Section 271(c)(2)(B)(i); 47 U.S.C. § 271(c)(2)(B)(i).

Several parties, including the State Commission Respondents and NARUC, filed motions requesting the Eighth Circuit to issue and enforce the mandate in the case of *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). These parties claimed the requirement of TELRIC pricing as a condition precedent to BOC entry was tantamount to reestablishing pricing standards contrary to the Eighth Circuit's ruling. On January 22, 1998, the Eighth Circuit held the FCC violated the central tenet of the Court's ruling when it issued its *Ameritech Order* of August 19, 1997. Pet. App. 5a. The Eighth Circuit reiterated its decision that the state commissions have exclusive jurisdiction to regulate prices and rejected the FCC's reassertion of local pricing authority under section 271, finding it lacked "even the scent of merit." Pet. App. 11a. It directed the clerk to issue a writ of mandamus ordering the FCC to abide by the mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. Pet. App. 5a; 1a-2a.

In March, 1998, the FCC and AT&T filed petitions for a writ of certiorari requesting this Court to consolidate review of the question presented in these petitions with its review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

REASONS FOR HOLDING THE PETITIONS

The State Commission Respondents and NARUC request that the Court hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases.[7] If this Court reverses the Eighth Circuit's jurisdictional decision, the reversal will require the writ of mandamus to be vacated. Affirmance of the Eighth Circuit jurisdictional ruling on pricing will require denial of the petitions for certiorari. Therefore, there is no need to consolidate the review of the questions presented in this petition with the review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

1. If the Court reverses the Eighth Circuit's jurisdictional ruling, the FCC will have the direct authority under sections 251 and 252 to define pricing. In that case, the Court will be required to grant the petitions and vacate the writ of mandamus, which rests on the Eighth Circuit's jurisdictional holding that Congress vested pricing authority with the states. The case would then be remanded for dismissal as moot.

2. If the Court affirms state authority to define pricing under section 252(d), then those decisions must be given effect in interpreting section 271(c)(2)(B)(i), which incorporates section 252(d)(1). It is the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *See, e.g., C.I.R. v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993), *on remand*, 1 F.3d 287 (5th Cir. 1993). Section 271 incorporates by reference the pricing

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[7] The FCC presented this disposition as an alternative in its petition. FCC Pet. at. p. 30.

standards which the states are granted exclusive authority to interpret under section 252(d). Once it is determined that states have exclusive authority over pricing under section 252(d), subject to federal district court review,[8] then that authority must be recognized in construing section 271. Acts of Congress should not be read as a series of unrelated and isolated provisions. *See Gustafson v. Alloyd Co. Inc.*, 513 U.S. 570 (1995), *on remand*, 53 F.3d 1078 (7th Cir. 1995). Here, section 271 and 252(d) must be construed together respecting state power over interconnection pricing (section 252(d)) by requiring deference to state exercise of pricing authority in section 271 proceedings.

3. It is also an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 248 (1985). The FCC's assertion of independent authority to define pricing standards for BOC entry could leave state commission pricing determinations, including those favorably reviewed by federal districts courts, without practical effect, in contravention of this basic rule of statutory construction. The FCC stated in its *Ameritech Order* that a BOC could not comply with the first checklist item if prices were determined using a methodology other than TELRIC. Pet. App. 29a-30a. If a state commission adopted prices under

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[8] State commission actions are reviewable by an appropriate Federal district court to determine whether the agreement or statement meets the requirements of sections 251 and 252. *See* 47 U.S.C. 252(e)(6).

sections 251 and 252 applying a methodology that differed from the TELRIC methodology required by the FCC for checklist compliance, a BOC would be precluded *ab initio* from entering the interLATA market. This outright prohibition on entry would lead to impasse between federal and state jurisdictions because a BOC would be faced with conflicting requirements on interconnection pricing in violation of the clear intent of section 271. The Eighth Circuit aptly described the TELRIC requirement as "clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes." Pet. App. 18a. Because the BOCs control roughly 80 percent of all access lines in the United States, the final outcome of this "intimidation tactic" would be to force states to adopt the FCC pricing standards or forego interLATA competition in their states.[9] *Id.* If the right to set prices is vested with the states, the FCC cannot extend its authority under the competitive checklist to undermine that jurisdiction. To allow this result would render state authority and the jurisdictional decision of the Eighth Circuit meaningless for four-fifths of the nation's telephone customers.

The FCC retains all requisite authority to review the competitive situation in each state and to make the ultimate decision to grant or deny BOC entry as envisioned by the Act. BOC entry should be dependent on a finding the local market is open to competition, not on an illegal

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[9] Because there is a continuing compliance requirement, states would be required to completely relinquish their pricing authority in order for BOCs to retain interLATA authority.

extension of the competitive checklist to require application of the FCC's pricing methodology.[10] The FCC's interpretation of its authority is not a necessary construction to discharge its duty under section 271.

4. The FCC contends that the mandamus order should be vacated because the Eighth Circuit lacked jurisdiction to consider issues arising under section 271.[11] The Eighth Circuit did not review the FCC's basis for denying the Ameritech 271 application, rather it properly left "the Ameritech Order untouched." Pet. App. 19a. The Eighth Circuit precluded the FCC from "using the advisory portion of its order as a vehicle by which it could intimidate state commissions. . . . " Pet. App. 19a. Since the pricing portion of the order was advisory, there has been no interference with the jurisdiction of the D.C. Circuit. Instead, the Eighth Circuit appropriately acted to protect its own jurisdiction to construe section 252(d) in the face of a deliberate FCC attempt to evade that decision by imposing its favored pricing methodology through section 271.[12] The Eighth Circuit's decision thus fully accords with the Wright, Miller & Cooper treatise on Federal Practice, cited by the FCC,[13] inasmuch as it dealt with an issue that lay within its jurisdiction in the past

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[10] The Act itself prohibits the FCC from extending the terms used in the competitive checklist. Section 271(d)(4).

[11] Section 402(a)(9) of the Communications Act, 47 U.S.C. section 402(a)(9), provides for review of Section 271 decisions in the Court of Appeals for the District of Columbia Circuit.

[12] Indeed, acceptance of the FCC's argument would allow it to evade the jurisdiction of every Court of Appeals except the D.C. Circuit by insertion of any sort of advisory material in a section 271 order.

[13] FCC Pet. at pp. 26-27.

and did not issue a writ to a tribunal whose decision could only be properly reviewed in another Circuit. *See* C. Wright, A. Miller & E. Cooper, 16 *Federal Practice and Procedure* § 3932, at 473-474 (1996) (footnote omitted).

Not only is the Eighth Circuit's decision fully correct; it is not certworthy. The decision is not a departure "from the accepted and usual course of judicial proceedings" as required by the Supreme Court Rule 10(a). The FCC is, not surprisingly, unable to marshal relevant precedent dealing with the unique circumstances in which an agency attempts to use an advisory opinion to defeat a Circuit Court's decision and then claims that advisory opinion is only reviewable in another Circuit. To the extent there is an "important question of federal law . . . " of the kind required by Supreme Court Rule 10(b) it is the construction of Section 252(d), which is already being considered by this Court.

CONCLUSION

The petitions for certiorari already under review involve complex issues arising under sections 251 and 252. They should not be allowed to become vehicles for a general review proceeding of all aspects of the Telecommunications Act of 1996. The new petitions for certiorari now being considered are inconsistent with basic principles of statutory construction and are not independently worthy of review. Indeed, dispositions of the new petitions will be largely ministerial once the Court makes its jurisdictional decision.

The Court should therefore hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases. If the Court affirms the jurisdictional ruling of the Eighth Circuit, the petitions must be denied. If the Court reverses the Eighth Circuit on pricing jurisdiction, the petitions should be granted and the writ of mandamus vacated. If the Court grants review and consolidates review of this question with the questions raised in No. 97-826 and related cases, separate argument should be granted.

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QUESTION PRESENTED

Whether the Eighth Circuit—having held in a prior decision that the Telecommunications Act of 1996 gives State commissions, not the FCC, exclusive authority to determine the "just and reasonable rates" for local interconnection arrangements under sections 251(c) and 252(d)—acted within the scope of its jurisdiction and discretion when it enforced its own mandate against the FCC, which, in defiance of the court's prior ruling, had reasserted authority to disregard the State commissions' local rate determinations and to impose its own pricing principles in evaluating an incumbent carrier's compliance with the requirements of sections 251(c) and 252(d).

LIST OF PARTIES AND AFFILIATES

The petitioners seek review of an order of the United States Court of Appeals for the Eighth Circuit. The order arises from the same underlying proceedings as the order challenged in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, cert. granted, No. 97-826 and related cases (U.S. Jan. 26, 1998). The parties to these proceedings are listed in the appendix to the petition for a writ of certiorari in No. 97-826 at 1a-4a, 73a-78a, 92a.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies and no non-wholly owned subsidiaries.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company,

Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre-Haute Cellular Telephone Company, Inc.

The GTE Entities consist of the following companies, each of which is a subsidiary of GTE Corporation: GTE Service Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated,

GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc. In addition, GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public: BC TELECOM, Inc., BBN Corporation, Cable-Axion Digitel Inc., Cable-Axion Quebec Inc., Caribbean Reservation Center, C. por A., Communications Telefonicas, C. por A., Conagro Telecommunications, S.A., CTI Compania de Telefonos del Interior S.A., CTI North Compania de Telefonos del Interior S.A., Digital Courier International Inc., GTE California Incorporated, GTE Directories Corporation Ltd., GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE Leasing Corporation, GTE Midwest Incorporated, GTE Mobilnet of Florence, Alabama Incorporated, GTE Mobilnet of Jacksonville Incorporated, GTE Mobilnet of Jacksonville II Incorporated, GTE Mobilnet of Wilmington Incorporated, GTE Mobilnet of Wilmington II Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE Telecom Saudi Arabia Ltd., GTE Yellow Pages Publishing Hungary Kft, La Compagnie de Telephone Anglo-Canadienne/ Anglo-Canadian Telephone Company, MTX Italia, Page Saudi Arabia Services, Ltd., Parque Industrial ITABO, S.A., Quebec-Telephone, Radiowealth, Inc., The Micronesian Telecommunications Corporation, and Zona France Las Americas.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco,

Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc. has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

The United States Telephone Association is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers.

These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-1519, 97-1520

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LOCAL EXCHANGE CARRIERS IN OPPOSITION

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, the GTE Entities, SBC Communications Inc., U S WEST, Inc., and the United States Telephone Association, petitioners below, respectfully oppose the petitions for a writ of certiorari.

Petitioners seek review of an Eighth Circuit order compelling compliance with that court's own prior mandate. In July 1997, the Court of Appeals ruled that the Tele-

communications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), "plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 796 (8th Cir. 1997). Scarcely a month later, in August 1997, the FCC openly defied the Eighth Circuit's ruling. Ostensibly invoking its authority to evaluate a Bell operating company's application to provide long-distance services, the agency announced its intention to ignore the State commissions' rate determinations and to decide for itself what pricing principles should be applied under the Act's local competition provisions. Because the agency's conduct conflicted with the court's prior holding and constituted a direct challenge to its authority, the Court of Appeals issued a writ of mandamus ordering the FCC to obey the prior mandate and to abandon its threat to override the States' substantive pricing determinations under the Act. Pet. App. 1a-2a.[1]

The Eighth Circuit's underlying jurisdictional holding is now before this Court in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, and related cases ("*Local Competition Case*"). The present petitions should be held pending the Court's decision in that case. If this Court were to affirm the Eighth Circuit's jurisdictional ruling, that court's order enforcing its own judgment would be plainly correct, the current petitions would present no independently certworthy question, and the petitions accordingly should be denied. If, on the other hand, the government were to prevail in its challenge to the jurisdictional ruling, the Eighth Circuit's underlying judgment would be vacated in part, the mandamus order enforcing that judgment would become moot, and these petitions could accordingly be disposed of summarily. Furthermore, granting these petitions would contribute nothing to the Court's consideration of the *Local Competition Case*: Petitioners have al-

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[1] "Pet. App." refers to the appendix to the petition in No. 97-1519.

ready addressed in their merits briefs the issues surrounding the mandamus order. Granting the petitions at this stage would merely add yet another layer of needless complexity—and several more rounds of multi-party briefing—to an already complicated proceeding involving seven discrete questions.

STATEMENT OF THE CASE

1. The 1996 Act. In the 1996 Act, Congress opened to further competition the markets for both local and long-distance telephone service. With respect to local telephone service, Congress chose to rely in the first instance on private carrier-to-carrier negotiations to establish the rates and other terms and conditions for local interconnection arrangements. Where the parties themselves cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the appropriate State commission to arbitrate their differences. 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "a State commission shall . . . establish any rates for interconnection, services, or network elements," in accordance with pricing standards spelled out in the statute. *Id.* § 252(c)(2).

In contrast to its broad reliance on private negotiations backed up by State-supervised arbitrations, Congress assigned the FCC a specifically circumscribed role in implementing the Act's local competition provisions. With a few tightly drawn exceptions,[2] Congress refused to give

[2] For example, if a State commission declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5). In addition, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." *Id.* § 251(e)(1). It also gave the FCC a role in defining a LEC's duty to provide "number portability," § 251(b)(2); in determining cost recovery

the FCC a charter to intrude on the States' traditional jurisdiction to regulate local exchange facilities and services. In particular, Congress assigned the FCC *no* responsibilities for the pricing of interconnection arrangements.

With respect to long-distance services, Congress established a mechanism for allowing the Bell operating companies (or "BOCs") to compete for the first time with the incumbent long-distance oligopolists (AT&T, MCI, and Sprint). *See* 47 U.S.C. § 271. To satisfy the conditions for long-distance entry, a Bell company must demonstrate that it has complied with a 14-point "competitive checklist" set forth in section 271(c)(2)(B). *See id.* § 271(d)(3)(A). The checklist in turn requires the Bell company to provide, among other things, "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." *Id.* § 271(c)(2)(B)(i).[3]

2. The Eighth Circuit's Local Competition Decision. In August 1996, the FCC issued a massive 700-page order, prescribing detailed national rules governing every conceivable aspect of local interconnection, including comprehensive and highly technical rules dictating to State commissions the precise formulas they must use in resolving pricing disputes under the Act. Two months later, the Eighth Circuit stayed the FCC's pricing rules because of "what appear[ed] to be a rather clear and direct indica-

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for numbering administration arrangements and number portability, § 251(e)(2); in determining what network elements should be unbundled, § 251(d)(2); in prescribing permissible resale restrictions, § 251(c)(4)(B); and in providing for the treatment of comparable carriers as "incumbents," § 251(h)(2).

[3] The checklist similarly requires "access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," 47 U.S.C. § 271(c)(2)(B)(ii), "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)," *id.* § 271(c)(2)(B)(xiii), and "services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)," *id.* § 271(c)(2)(B)(xiv).

tion [in the statutory text] that the state commissions"—not the FCC—"should establish prices." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.). This Court subsequently denied repeated applications to vacate the stay. 117 S. Ct. 378, 379 (1996) (Thomas, J., Circuit Justice); 117 S. Ct. 429 (1996).

In July 1997, after further briefing and oral argument, the Court of Appeals held, in the plainest possible terms, that "none of the statutory provisions relied on by the FCC supply it with jurisdiction over the pricing of local telephone service"; on the contrary, the language of the 1996 Act "directly and straightforwardly assigns *to the states* the authority to set the prices regarding the local competition provisions of the Act in subsections 252(c)(2) and 252(d)." *Iowa Utils. Bd.*, 120 F.3d at 795, 797 (emphasis added). The court accordingly vacated as unlawful the FCC's rules purporting to intrude on the pricing jurisdiction that Congress had reserved to the States.

3. The FCC's Response. The FCC made no effort to hide its disdain for the Eighth Circuit's jurisdictional rulings. Immediately after the court entered its stay order, the FCC's then-chairman branded the ruling "a grievous error" and "an astounding piece of judicial activism,"[4] exhibiting "[t]he kind of awesome supremacy that the Chinese emperors would exercise over every rice-picking effort in the country."[5] After the court issued its merits decision, the chairman reiterated his displeasure with the Eighth Circuit's "judicial intervention," accusing the court of "substitut[ing] its judgment for ours" and urging Con-

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[4] Reed Hundt, *Speech Before International Radio & Television Society*, 1996 FCC LEXIS 5840, at *15-*16 (Oct. 18, 1996).

[5] *Hundt Calls Court Stay of FCC Rules Example of Extreme Judicial Activism*, Daily Report for Executives, at C-1 (Oct. 17, 1996).

gress to amend the Act "until courts finally submit to its direction." [6]

On August 19, the FCC put this rhetorical defiance into practice. In an order rejecting on other grounds Ameritech's application for authority to provide long-distance service in the State of Michigan, the FCC went out of its way to announce its intention to disregard the Eighth Circuit's holding that the States alone have jurisdiction to determine the pricing of interconnection arrangements. *Application of Ameritech Michigan*, 12 FCC Rcd 20543 (1997) ("Ameritech Order") (excerpts reproduced at Pet. App. 21a-34a). In a portion of its order expressly unrelated to its disposition of Ameritech's application (*see id.* at 21a), the Commission claimed that its authority under section 271 to evaluate a Bell company's compliance with the "competitive checklist" empowers it to displace the States and to determine for itself the pricing principles that a Bell company must follow under sections 251(c) and 252(d). As if to underscore its point, the FCC proceeded to reimpose for purposes of section 271 precisely the same pricing principles that the Eighth Circuit had vacated a month earlier. *See id.* at 28a-34a.

The FCC attempted to sidestep the Eighth Circuit's decision by stating that, because the court's holding rested on jurisdictional grounds, "[t]he court . . . expressly did not address the substantive merits of the Commission's [vacated pricing] rules," and it therefore "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* at 23a-24a. The agency accordingly asserted that it was at liberty, despite the Eighth Circuit's decision, to re-impose uniform national pricing standards under section 271 that would trump State pricing jurisdiction under sections 251 and 252.

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[6] Reed Hundt, *The Light at the End of the Tunnel vs. the Fog: Deregulation vs. the Legal Culture*, 1997 FCC LEXIS 4330, at *9. *10, *12 (Aug. 14, 1997).

4. The Eighth Circuit's Order Enforcing its Mandate. Soon after the Ameritech Order was released, respondents and a group of 32 State commissions filed separate petitions to enforce the Eighth Circuit's mandate in *Iowa Utilities Board*. After briefing and oral argument, the Eighth Circuit issued a writ of mandamus directing the FCC to comply with the court's prior mandate.

The Court of Appeals stated that the FCC's "attempt to reassert the vacated pricing rules by imposing them as conditions for [long-distance] entry by the Bell Operating Companies . . . does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do." Pet. App. 8a. Examining the FCC's rationale for its conduct, the court observed that the relevant portions of section 271 "do nothing more than incorporate by reference the specific requirements of sections 251 and 252," and "our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d)." *Id.* at 10a. In light of that earlier decision, the court stated, the FCC's role under section 271 is "quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application." *Id.* at 12a. By imposing on Bell companies, as a condition for obtaining relief under section 271, the requirement that they establish local pricing pursuant to the FCC's pricing methodology rather than the State commission's methodology, the FCC was simply attempting to exercise section 252 pricing authority through section 271. But "the very core of our holding," the court stated, "was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d)." *Id.* at 10a. "The FCC may not accomplish indirectly that which we have held it may not do directly." *Id.* at 15a.[7]

[7] The Court of Appeals explained: "The FCC is free to ask (and indeed has asked) the Supreme Court to reverse our decision [on jurisdiction], and it is free to ask Congress to give it the authority

The Eighth Circuit was further troubled by the fact that the FCC's renewed claim of pricing authority was "calculated to have a chilling effect on the state commissions' employment of . . . pricing schemes [different from those preferred by the FCC], and to do so in a way that avoids our review." Pet. App. 18a. "Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit," and aware that the statute assigns direct review of section 271 orders to the D.C. Circuit, "the FCC now seeks to have another bite at the apple in the District of Columbia Circuit." *Id.* "This is the type of 'evasion' that necessitates mandamus relief." *Id.* The court explained that "[f]ailure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would 'reward bureaucratic misconduct and encourage judicial anarchy.'" *Id.* at 16a (quoting *Department of the Navy v. FLRA*, 835 F.2d 921, 923 (1st Cir. 1987)).

In line with precedent,[8] the Eighth Circuit took care to craft purely forward-looking relief. Leaving the Ameritech Order itself entirely "untouched," the court sought only to "assure state commissions that the pricing authority granted to them under section 252 is not eviscerated" and to "disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated" in the advisory portion of the Ameritech Order. *Id.* at 19a. The court accordingly directed the FCC to comply with the mandate in *Iowa Utilities Board* in the future

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to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate [its preferred] pricing schemes for the local competition provisions when our order so clearly denies it that authority." Pet. App. 13a-14a (footnotes omitted).

[8] *American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, *later opinion*, 673 F.2d 82 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

and to "cease and desist from attempting to give effect to its interpretation of the substantive [pricing] requirements of section 252(d)." *Id.* at 19a-20a.

ARGUMENT

I. THE PETITIONS SHOULD BE HELD PENDING THIS COURT'S DECISION IN THE *LOCAL COMPETITION CASE*

Because the Eighth Circuit issued its mandamus order solely to enforce its jurisdictional mandate in *Iowa Utilities Board*, this Court's decision on the underlying jurisdictional question will control the disposition of the present petitions. As discussed in the following section, if the Court affirms the Eighth Circuit's judgment, as we believe it should, nothing in these petitions—which attack only the Court of Appeals' established authority to protect its own judgment—will warrant independent review. On the other hand, if this Court were to reverse the Eighth Circuit's jurisdictional ruling, its decision would effectively moot the mandamus dispute. In that event, under this Court's usual practice, the current petitions would be granted, the judgment below would be vacated, and the case would be remanded for dismissal on the basis of mootness. *E.g., Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979); *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950). For these reasons, as the Solicitor General correctly suggests, these petitions should be held pending this Court's decision in the underlying case and should be disposed of in light of that decision.

The Court should reject the Solicitor General's alternative request to grant certiorari and consolidate these petitions for review with the pending case. The Court already has before it for consolidated briefing and argument seven discrete questions presented by eight separate petitions and cross-petitions encompassing two different Eighth Circuit judgments, each supported by a separate opinion and each

addressed to a separate and extraordinarily lengthy FCC order. Petitioners and their supporters have filed over 260 pages of opening briefs on these issues, and three additional rounds of briefing will soon follow. The current petitions concern a related Eighth Circuit decision implicating yet another lengthy FCC order. Granting review now would serve only to complicate further a multi-faceted, multi-party case of unusual magnitude and would subject both the Court and the parties to the potentially pointless dedication of still more resources to an issue that, under the government's own view of the case, may become moot. In addition, if certiorari were granted in this case, briefing would proceed on a different schedule from the principal proceeding—making it particularly difficult to coordinate briefs and avoid duplication.

The Court would gain nothing of substance from such an undertaking. Because petitioners have already fully addressed in their merits briefs the respects in which they believe that the Eighth Circuit's mandamus order bears on the issues currently before the Court, further separate briefing on the mandamus issue would be repetitive and would yield no benefits.

Nor is there any merit to petitioners' speculative assertion that immediate review is needed to forestall requests for "a variety of emergency remedies from the D.C. Circuit, perhaps from the Eighth Circuit, and ultimately from this Court"—requests that supposedly will be triggered by the FCC's "compliance with (and interpretation of) the mandamus order." FCC Pet. 29. In the first place, the FCC will confront no genuine issue of "interpretation": it must simply confine its "pricing role" under section 271, as the Court of Appeals directed, to "determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, [long-distance] services." Pet. App. 20a. And if an affected party nonetheless

chooses to apply for emergency relief from any FCC action—an event that is no more likely to occur if this Court holds the current petitions—the courts are amply equipped to respond based on the merits of any such request. Nothing about that hypothetical scenario remotely justifies a premature grant of review.

II. THE PETITIONS PRESENT NO INDEPENDENTLY CERTWORTHY ISSUE

Although holding these petitions is the sensible course given the pendency of a directly related case, the petitions present no question independently worthy of this Court's review. The Eighth Circuit's order is both wholly consistent with the statute and amply supported by settled precedent in this Court and in the courts of appeals.

A. The Court of Appeals Plainly Had Jurisdiction to Enforce Its Own Mandate

Petitioners assert that the Eighth Circuit had no jurisdiction to issue its mandamus order. FCC Pet. 24-27; AT&T Pet. 17 n.4.[9] In their view, because Congress designated "the D.C. Circuit as the exclusive forum for review of 'any order of the Commission granting or denying any application' under Section 271" (FCC Pet. 25), and because a court may issue mandamus only in aid of its own jurisdiction, the Eighth Circuit was powerless to address any defiance of its mandate that the FCC might express in a section 271 order. Petitioners overlook the fact that the Eighth Circuit's jurisdiction had already attached in the prior proceedings in the Eighth Circuit: "The need for an independent basis of jurisdiction is easily applied when jurisdiction has already attached," as in "cases that authorize issuance of a writ to enforce compliance with the mandate rendered on a prior appeal or writ proceeding." C. Wright, A. Miller & E. Cooper, 16

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[9] "AT&T Pet." refers to the petition in No. 97-1520.

Federal Practice and Procedure § 3932, at 473-74 (2d ed. 1996) (footnote omitted).[10]

As this Court has squarely held, that rule applies even where the decision in which the defiance occurs is appealable only to some other court. In *United States v. United States District Court for the Southern District of New York*, 334 U.S. 258 (1948), the Second Circuit had held that it was without mandamus jurisdiction to enforce its prior mandate because the district court's order at issue was by then reviewable only by direct appeal to the Supreme Court. On certiorari, this Court reversed. Rejecting an argument indistinguishable from that advanced here by petitioners, the Court ruled that an appellate court may issue mandamus even "where there is no existing or future appellate jurisdiction to which it can relate." *Id.* at 263. The "high function of mandamus," the Court stated, "may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one." *Id.* at 264. The Court accordingly ruled that the court of appeals *did* have mandamus jurisdiction "even though we assume arguendo that all further appeals in the case would come here." *Id.*[11]

The Solicitor General argues that the Eighth Circuit should nonetheless have declined to exercise its mandamus

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[10] *See also Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority. . . . A party always has recourse to the court to seek enforcement of its mandate."); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (invoking "our inherent power to construe the mandate of our earlier decision").

[11] The Solicitor General's reliance (Pet. 26-27) on *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988), is entirely misplaced. The Second Circuit in that case refused to issue mandamus directed to a district judge in Puerto Rico because the Puerto Rico court was not, and had never been, "a district court over which appellate jurisdiction existed." *Id.* at 204. The same reasoning obviously does not apply in this case.

authority because a direct appeal to the D.C. Circuit provided an alternative remedy. FCC Pet. 26 & n.10. But, even if the advisory pricing discussion in the Ameritech Order could properly have been appealed, that would not foreclose the mandamus relief granted here: an alternative remedy can bar mandamus only if it is *adequate*, and an opportunity to relitigate a previous decision is *never* adequate. The Solicitor General's argument to the contrary is again foreclosed by this Court's precedent. In *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (per curiam), this Court directed mandamus to a state trial court that had defied the Supreme Court's earlier mandate. The Court rejected the argument, echoed here, that mandamus was barred by the availability of immediate appeals within the state-court system: "A litigant who . . . has obtained judgment in this Court after a lengthy process of litigation . . . should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Id.* at 497.[12]

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[12] The cases on which the FCC relies (FCC Pet. 26) did not involve mandamus petitions seeking to enforce a prior mandate. In cases like this one, by contrast, the courts of appeals have not hesitated to grant mandamus despite the availability of an immediate direct appeal. *See, e.g., American Trucking*, 669 F.2d at 960 (granting forward-looking mandamus relief even though the agency's defiance was manifested in immediately appealable orders); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 594, 597 (D.C. Cir.) (granting mandamus because FCC's positions, even though expressed in an immediately appealable order, "are clearly inconsistent with the basic themes of our [prior] decision"), *cert. denied*, 439 U.S. 980 (1978); *Citibank, N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978) ("Regardless of the availability of appeal, we think that the writ of mandamus is the proper remedy to compel the district court to comply with our earlier order."); *Yablonski v. United Mine Workers Union*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (issuing mandamus even though "the order now challenged was appealable"), *cert. denied*, 406 U.S. 906 (1972).

B. The FCC's Renewed Assertion of Pricing Jurisdiction Violated the Eighth Circuit's Prior Mandate

Petitioners' merits argument rests on a manifestly mistaken premise. In their view, because section 271 authorizes the FCC to assess a Bell company's compliance with the competitive checklist, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" (47 U.S.C. § 271(c)(2)(B)(i)),[13] section 271 necessarily authorizes the agency to formulate its own substantive pricing standards for interconnection independent of those applied by the State commissions to whom section 252(d) expressly assigns that responsibility. *See* FCC Pet. 15, 28. Petitioners' inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission*." 47 U.S.C. § 252(d)(1) (emphasis added).

With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252. Contrary to the Solicitor General's supposition, this conclusion does not force the FCC to give "dispositive weight . . . to a state commission's legal evaluation of the Bell company's claims of compliance with Sections 251(c) and 252(d)(1)." FCC Pet. 17. The FCC still has ultimate responsibility for determining, when it reviews a section 271 application, whether a Bell company is in *compliance* with the relevant pricing requirements. The State commissions' responsibility, by contrast, is to *define* the pricing requirements with which

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[13] *See also* 47 U.S.C. § 271(c)(2)(B)(ii); § 271(c)(2)(B)(xiii); § 271(c)(2)(B)(xiv).

the Bell company must comply. Those discrete roles are wholly compatible.

At bottom, of course, petitioners dispute the Eighth Circuit's underlying holding that the States have exclusive jurisdiction to determine the pricing terms of local interconnection arrangements. But that issue is already before the Court in the *Local Competition Case*; for purposes of these petitions, one must assume that the Eighth Circuit was correct. *See* FCC Pet. 14. On that assumption, petitioners' reading of section 271 is nonsensical. Once a State exercises its pricing authority, the resulting determination is legally binding; it establishes the law that a Bell company must follow in setting prices. Under petitioners' theory, however, section 271 empowers the FCC to override a State's pricing determinations and independently dictate the intrastate pricing principles that a Bell company must follow to obtain long-distance entry.

That approach would penalize any State that dared to deviate from the FCC's pricing principles, for its consumers would then be deprived of increased long-distance competition. And a Bell company would be forced either to forsake its rights and obligations under State-approved pricing provisions or forgo its statutorily guaranteed opportunity to apply for long-distance authority. Moreover, because the Bell companies serve roughly 80% of all access lines in the United States,[14] and because the State commissions are unlikely to apply different pricing principles to different carriers subject to their jurisdiction, the coercive effect of the FCC's approach will be felt by all States and all incumbent local exchange carriers.

It is inconceivable that Congress would have intended such a perverse jurisdictional regime—in which the FCC would be free to substitute its own pricing standards for those of a State if, but only if, a Bell company files an ap-

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[14] *See* FCC, Statistics of Communications Common Carriers, Tables 2.3, 2.19 (Dec. 1997).

plication for long-distance authority, and in which the States dare not exercise the pricing authority so plainly assigned to them. Certainly, nothing in the statutory text requires that result. The Solicitor General said as much when he asked this Court to vacate the Eighth Circuit's stay: "Congress intended . . . both the States and the FCC [to] apply consistent principles for interconnection and unbundled access in their respective proceedings under Sections 252 and 271." Application to Vacate Stay, *FCC v. Iowa Utils. Bd.*, No. 96-299, at 31 (filed Oct. 24, 1996). Although the Solicitor General now takes a different view of the matter (FCC Pet. 20, 27-28), he nowhere explains how his reading of the FCC's authority under section 271 can possibly be reconciled with the Eighth Circuit's jurisdictional holding in the *Local Competition Case*.

Petitioners gain nothing from their backup argument that the FCC can override the States' rate determinations under cover of the statute's "public interest" standard. *See* FCC Pet. 16; Pet. App. 28a ("even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271 (d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C)"). Although it is true that one of the requirements for approval of a section 271 application is that "the requested authorization is consistent with the public interest," 47 U.S.C. § 271(d)(3)(C), that provision cannot sensibly be read to negate the balance of the statute's jurisdictional allocation.

On the contrary, Congress took care to prevent precisely the sort of unbounded interpretation that petitioners here advocate. It specified that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4). For the FCC to hold that subservience to its preferred pricing principles, though not required by sections 251 and 252 or by the checklist, *is* required for purposes of the public-

interest determination would improperly "extend the terms used in the competitive checklist."

Finally, there is no merit to AT&T's assertion that the Eighth Circuit's mandamus order "is in direct conflict with" the D.C. Circuit's decision in *SBC Communications Inc. v. FCC*, No. 97-1425, 1998 U.S. App. LEXIS 5276 (D.C. Cir. Mar. 20, 1998), affirming the FCC's denial of a section 271 application in Oklahoma. *See* AT&T's Supp. Br. 3. The D.C. Circuit neither had before it nor purported in any way to decide whether section 271 entitles the FCC to substitute its pricing policies for those of the relevant State commission under section 252(d). Rather, the D.C. Circuit said only that Congress charged "the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for [long-distance] authorization," and "the statute does not require the FCC to give the State commissions' views any particular weight" in making those decisions. Slip op. 13, 1998 U.S. App. LEXIS 5276, at *21. Neither of those propositions conflicts in any way with the Eighth Circuit's ruling. That the FCC has authority to assess a Bell company's compliance with the checklist's requirements is neither disputed nor in conflict with the Eighth Circuit's holding that State commissions have authority to define the pricing requirements with which the Bell company must comply. The Solicitor General thus correctly acknowledged, before the D.C. Circuit issued its decision, that the *SBC Communications* case did not implicate "the basic issues presented" in the present petitions. FCC Pet. 24 n.8.

CONCLUSION

The petitions for a writ of certiorari should be held pending review of this Court's decision in the *Local Competition Case* and should be disposed of in light of that decision.

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No. 97-1520

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

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for the Eighth Circuit

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In their responses, the state commissions ("NARUC") and the incumbent local exchange carriers ("LECs") contend that the instant petitions should not be granted and consolidated with *AT&T Corp.* v. *Iowa Utilities Board*, No. 97-826 ("*Iowa Utilities Board*"), but rather should only be held pending decision in that case. Their claims rest on a single premise: that the Court will never need to grant plenary review of the Eighth Circuit's mandamus decision no matter what the outcome in *Iowa Utilities Board*. If the Court reverses the Eighth Circuit on the jurisdictional issue presented in *Iowa Utilities Board*, they point out, the writ of mandamus will then certainly have to be vacated. Conversely, they contend, if the Court affirms the Eighth Circuit on that jurisdictional issue, then the mandamus decision "would be plainly correct" and "the petitions accordingly should be denied." LECs, p. 2; *see also* NARUC, p. 5. While the first proposition is accurate, the second assuredly is not.

Even if the FCC does not have jurisdiction to bind state commissions on pricing issues in arbitrations under §§ 251 and 252 of the Act, § 271 expressly gives the FCC the authority to review a BOC's prices in evaluating an application to provide long-distance service that is "typically *interstate*." See *SBC Communications, Inc.* v. *FCC*, No. 97-1425, 1998 U.S. App. Lexis 5276 (D.C. Cir. March 20, 1998), slip op. at 12-13 (emphasis in original). This is the same responsibility that was exercised by federal authorities, and not state authorities, under the AT&T Consent Decree prior to the Telecommunications Act of 1996, and it is entirely consistent with the terms, structure, and purposes of that Act for it to continue to be a matter of federal responsibility. This petition thus presents an issue of immense national importance that the Eighth Circuit will have decided incorrectly -- and in conflict with the D.C. Circuit's subsequent decision in *SBC Communications* -- even if the Eighth Circuit's earlier holding stripping the FCC of

jurisdiction to adopt pricing rules applicable to state arbitration decisions is affirmed. And even the oppositions do not dispute that unless certiorari is granted now, the Court will be presented with the same issue through emergency stay applications instead, and that consideration of that issue at the same time as *Iowa Utilities Board* would present no incremental burden in light of the fact that the Court will be considering § 271 at that time in any event.

1. The suggestion that the Court would have no independent issue to decide in reviewing the mandamus decision if it affirmed the Eighth Circuit's prior holding on jurisdiction over state arbitrations is preposterous. While we believe it is clear that the prior jurisdictional decision is incorrect, it is also clear that even if § 252 of the Act expressly denied the FCC the authority to issue rules that bind state commissions in setting prices in arbitrations, the FCC still would have not only the authority, but the statutory duty, to interpret the federal statutory pricing requirements in applying § 271(c)(2)(B)'s "competitive checklist" and to consider a BOC's pricing practices in determining whether its entry into the long-distance market would satisfy § 271(d)(3)(C)'s separate "public interest" test.

a. There is no textual basis for the Eighth Circuit's contrary conclusion. Section 271 requires the FCC to "find[]," before granting long-distance authority, that the BOC is providing access and interconnection "in accordance with the [pricing] requirements of §§ 251(c)[] and 252(d)[]" and that the BOC's entry will be in the "public interest." *See* 47 U.S.C. §§ 271(d)(3), 271(c)(2)(B), 271(d)(3)(C). In making these determinations, the FCC must give "substantial weight" to the recommendations of the Department of Justice (§ 271(d)(2)(A)), but it is required merely to "consult with"

the pertinent state commission (§ 271(d)(2)(B)). These provisions foreclose the notion that the FCC must give preclusive effect in § 271 proceedings to state commission determinations on these issues.

The Oppositions contend that the competitive checklist merely "incorporates by reference" § 252(d). But § 252(d) is entitled "Pricing Standards," and, as the States acknowledge (NARUC, pp. 5-6), it is those substantive "pricing standards" that are incorporated in the checklist. For purposes of § 271, the FCC's responsibility to "find" that the BOC's prices satisfy those standards necessarily includes the authority to interpret those standards.

In this regard, the language authorizing the FCC to determine whether a BOC has satisfied the statutory requirements for long distance entry is virtually identical to the language authorizing federal district courts to review state arbitration decisions.[1] The judicial review provision thus "incorporates by reference" § 252 in the same way as does § 271. However, as the States concede (NARUC, p. 6 n.8), federal district courts under § 252(e)(6) determine whether the resulting agreement complies with the substantive standards set forth in the Act; they are not charged with the purely clerical task of checking to see if LECs are complying with state commission orders. There is likewise no conceivable basis for reading the same authorizing language in § 271 to

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[1] *Compare* §§ 271(c)(2)(B)(i, ii, xiv) (FCC must determine whether the BOC is offering access and interconnection "in accordance with the requirements of §§ 251(c)[] and 252(d)[]") *with* § 252(e)(6) (district courts must determine whether the terms of the arbitrated agreement"meet[] the requirements of section 251 . . . and this section [252]").

relegate the FCC to performance of that essentially clerical task.

The States' position therefore rests not on the incorporation of § 252 within the competitive checklist of § 271, but on the assertion that the States have "exclusive authority to interpret" the pricing standards of § 252 in all proceedings under the Act. NARUC, p. 6. Such an argument simply assumes its conclusion. No provision of the Act grants the States "exclusive authority to interpret" the Act's pricing requirements in all proceedings, and the Eighth Circuit's prior decision did not even consider whether the States had such authority under § 271, for the issue was not then presented. To the contrary, the only issue before the Eighth Circuit in the prior decision was whether the FCC had the authority to issue pricing rules that would bind state commissions exercising their authority under the Act to conduct arbitrations. In holding that the FCC did not have such authority, the Eighth Circuit relied on § 252(c) -- which is entitled "Standards for Arbitration," and which addresses only what States must do "[i]n resolving by arbitration" open issues between the parties to a prospective interconnection agreement. See 47 U.S.C. § 252(c); *Iowa Util. Bd.* v. *FCC*, 120 F.3d 753, 794-796 (8th Cir. 1997). By contrast, § 271 expressly assigns responsibility for proceedings on long-distance entry to the FCC.

Indeed, presumably recognizing that § 271's requirement that the FCC make findings that a BOC has complied with § 252(d) cannot be reconciled with the suggestion that the FCC has no independent role in that area, the LECs attempt to preserve the semblance of such a role by disingenuously suggesting (LECs, pp. 14-15) that the FCC still has the "ultimate responsibility" to determine whether the BOC is in

compliance with the state commission orders. As the BOCs themselves have elsewhere made abundantly clear, however, that is no role at all.[2]

The Eighth Circuit similarly erred in artificially limiting the separate "public interest" test that the FCC is required to apply under § 271(d)(3)(C). The FCC, like numerous other federal administrative agencies, has been required to make "public interest" determinations about market entry since long before the 1996 Act, and it is settled law that such inquiries "require consideration of all important consequences including anticompetitive effects." *Denver & Rio Grande W.R.R.* v. *United States*, 387 U.S. 485, 492 (1967); *see also FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94 (1953). Indeed, even if the AT&T Consent Decree and § 271 had never existed, the FCC would still have been required under the Communications Act of 1934 to determine whether a BOC's entry into the long-distance market would be in the "public interest" before such entry would be authorized. *See* 47 U.S.C. § 214. And under any "public interest" inquiry, if a BOC is charging excessive prices for access and interconnection that enable it to maintain its local monopoly and to leverage that monopoly in the long-distance market, the FCC not only may, but must, take that into account in

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[2] *See, e.g.*, Reply Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231 (filed Dec. 19, 1997), p. 23 ("the Louisiana PSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the [FCC] to decide"); *see also* Pet. App. 12a (the Act "contemplate[s]" the FCC "simply asking the state commission whether the applicant BOC has complied with the state commission's pricing rules").

assessing the effect of the BOC's entry on the public interest. The LECs' only response is to claim (LECs, pp. 16-17) that such an inquiry would impermissibly "extend" the checklist. That response is insubstantial. It cannot constitute an impermissible extension of the checklist for the FCC to conduct the very public interest inquiry that the Act imposes as a separate and independent precondition for BOC long-distance entry.

b. Contrary to the positions expressed in the Oppositions, application of § 271 as written infringes no legitimate interests of the States. States never had any role prior to the 1996 Act in determining whether a BOC had satisfied the conditions necessary for entry into the overwhelmingly interstate long-distance market, and the only role granted them by § 271 of the Act is to be included in a non-binding consultation with the FCC. Nor does a State have the right or the power to require that every price charged for access and interconnection within its borders comply with its interpretation of §§ 251 and 252. To the contrary, as the LECs note (LECs, p. 3), the Act permits "private carrier-to-carrier negotiations to establish the rates" and, where such negotiations lead to agreements, a State may *not* disapprove them for failing to comply with its interpretation of the Act.[3] A BOC and a competitor may thus agree to prices set under the FCC's methodology without trenching upon (or even implicating) any conceivable understanding of the scope of state jurisdiction to arbitrate disputed issues. Therefore, even if § 252 expressly prohibited the FCC from adopting rules to

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[3] *Compare* § 252(e)(2)(B) (State may reject arbitrated agreement for failing to comply with §§ 251 and 252) *with* § 252(e)(2)(A) (State may reject negotiated agreement only if it is discriminatory or contrary to the public interest).

bind state arbitrations (as it does not), that prohibition would not prevent the FCC from conditioning long-distance entry on negotiated agreements that include such terms.

It is thus nonsense to suggest (LECs, p. 6) that the FCC has left state commissions with no authority over prices or has sought to "trump State pricing jurisdiction." Any usurpation here is in the opposite direction. Under the Act, a state commission is free to set effective prices for local exchange service in arbitrating disputes over interconnection agreements. A state commission simply may not insist that those pricing decisions also control critical aspects of long-distance entry decisions, thus "trumping" the authority expressly granted to the FCC and creating up to 50 different interpretations of a single federal statutory entry standard.

2. As our Supplemental Brief explained, the D.C. Circuit's decision in *SBC Communications, Inc.* v. *FCC*, No. 97-1425, 1998 U.S. App. Lexis 5276 (March 20, 1998) (Silberman, J.), directly conflicts with the reasoning of the Eighth Circuit. The LECs purport to distinguish *SBC Communications* solely by pointing out (LECs, p. 17) that the D.C. Circuit did not specifically discuss whether the FCC is obliged to defer to state commissions' "pricing policies" in ruling on § 271 applications. Their point is true but immaterial. *SBC Communications* broadly held that, in addressing § 271 applications, "the statute does not require the FCC to give the State commissions' views any particular weight." Rather, the FCC must "conclude[] to its own satisfaction that the applying BOC has satisfied . . . the [] statutory requirements." Slip Op. at 12-13. That holding, by its terms, covers all statutory requirements for § 271 authorization, including both the pricing requirements that are part of the competitive checklist and the public interest test.

Indeed, the BOCs unsuccessfully made precisely the same legal argument to the D.C. Circuit that they successfully made to the Eighth Circuit. The issue in *SBC Communications* was whether SBC faced a facilities-based local competitor in Oklahoma. SBC contended that because the issue of whether another carrier had entered the local market was within the exclusive responsibility of the State under § 2(b) of the Communications Act, it was therefore "fence[d] off from FCC reach" even in the context of § 271 proceedings. *See Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 370 (1986). The court flatly rejected the claimed relevance of § 2(b) and *Louisiana* to § 271, explaining that "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA [long distance] authorization, and interLATA service is typically *interstate*." Slip Op. at 13 (emphasis in original). That holding is irreconcilable with the Eighth Circuit's conclusion that because it had previously held that § 2(b) leaves pricing issues in arbitrations to the States for purposes of local competition, the FCC therefore must likewise treat state pricing determinations as conclusive for purposes of applying the statutory entry test for long-distance service.

Because the D.C. Circuit has exclusive jurisdiction to review the FCC's determinations on § 271 applications, its conflict with the Eighth Circuit's writ has the potential to create extraordinary difficulties for the FCC and the industry in future § 271 proceedings. This conflict concerning the FCC's authority under § 271 strongly supports immediate review in this case.[4]

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[4] This situation also graphically illustrates why the Eighth (continued...)

3. Finally, the LECs suggest that the Court should not be concerned about the prospect that it may have to address the important question of the FCC's authority under § 271 in the context of an emergency stay application, perhaps while review of *Iowa Utilities Board* is pending. The LECs' first contention is that an emergency stay application is no more likely if this petition is held than if it is now granted. That statement is plainly wrong. As described in our petition, the issue of the FCC's authority independently to make pricing decisions in § 271 proceedings may by early 1999 become decisive in determining whether individual applications are granted or denied. *See* Pet. 25-26. Accordingly, if the petition is not granted and consolidated with *Iowa Utilities Board* for review, the § 271 issue is much more likely to come to the Court through an emergency application.

The LECs' second response to the prospect of initially deciding this issue through an emergency stay proceeding is "so what?" The LECs note (LECs, p. 11) that the Court is "amply equipped" to decide stay motions. But our concerns are genuine and significant. Numerous § 271 applications are expected to be filed in the next year and a half. Congress required expedited treatment of these applications, and mandated prompt agency action under a 90-day deadline.

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[4] (...continued)
Circuit's assertion of jurisdiction to issue the writ of mandamus cannot have been correct. Sections 402(b)(6) and (9) of the Act vest exclusive jurisdiction to review the FCC's § 271 decisions in the D.C. Circuit. The Act contemplates that the D.C. Circuit will develop a unified, coherent body of law for the FCC to apply in § 271 proceedings. The Eighth Circuit's intrusion into that process severely disrupts the statutory scheme.

See § 271(d)(3). But the FCC and the industry are now confronted with an Eighth Circuit order requiring the FCC to defer to state commission pricing decisions in ruling on § 271 applications and with a decision of the D.C. Circuit (which has exclusive jurisdiction to review § 271 decisions) interpreting § 271 to require the FCC to make its own independent judgment whether § 271's requirements have been met. It would best further Congress' intent, and be most efficient for the Court, to resolve this conflict in advance of the flood of applications, at the same time the Court addresses the other two decisions in *Iowa Utilities Board*. By contrast, there is no basis to believe that any legitimate interest will be served by instead addressing this important issue in the abbreviated context of a stay application.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

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SUPPLEMENTAL BRIEF

Petitioners file this supplemental brief pursuant to Supreme Court Rule 15.8 to "call[] [the Court's] attention to [a] new case[]." On March 20, 1998, the D.C. Circuit issued a decision that strongly underscores the importance of granting this petition and scheduling this case to be heard in October 1998, in connection with *AT&T, et al.* v. *Iowa Utilities Board*, No. 97-826 (and related cases). See *SBC Communications, Inc.* v. *Federal Communications Commission*, No. 97-1425 (D.C. Cir. March 20, 1998).[1]

The D.C. Circuit has now held that under section 271(d)(3) of the Telecommunications Act of 1996 ("1996 Act"), the Federal Communications Commission ("FCC") is required to "conclude[] to its own satisfaction" that a Bell Operating Company ("BOC") seeking long distance authorization has met each of the "statutory requirements" set forth in section 271, and that, in so doing, "the statute does not require the FCC to give the State commissions' views any particular weight." *SBC Communications*, slip op. at 12-13. The D.C. Circuit's decision clearly conflicts with the Eighth Circuit's analysis of section 271 in the mandamus decision under review. The Eighth Circuit prohibited the FCC from making its own determination of whether a BOC had satisfied the 1996 Act's pricing requirements, and instead required the FCC to defer to state commissions' pricing determinations in acting upon section 271 applications. Thus, the FCC now must obey an Eighth Circuit order to defer to state commission pricing decisions in ruling on section 271 applications, knowing all the while that the D.C. Circuit, which has exclusive jurisdiction to

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[1] Fifteen copies of the decision have been lodged with the Court.

review the FCC's section 271 orders, has interpreted section 271 to require the FCC to "conclude[] to its own satisfaction" that federal statutory requirements have been met. These conflicting interpretations of section 271 heighten the probability that, if argument on this matter is not heard in the Fall, it will have to be addressed by the Court in the rushed and abbreviated context of emergency stay applications in connection with future Section 271 applications.

In *SBC Communications*, the D.C. Circuit affirmed the FCC's decision under section 271(d)(3) that SBC Communications had not satisfied section 271(c)'s threshold requirement that a BOC meet conditions set forth in subsections 271(c)(1)(A) or 271(c)(1)(B), known as Track A and Track B. Those provisions require that a BOC seeking long-distance authorization under Section 271 either demonstrate the presence of a facilities-based competitor in its local market or demonstrate that the absence of such a competitor is solely attributable to the fact that no carrier is seeking to become a facilities-based local competitor. See 47 U.S.C. §§ 271(c)(1)(A), 271(c)(1)(B). The court of appeals rejected SBC's argument that the FCC is obligated to defer to a state commission decision that the BOC has satisfied Track A. It held that, to the contrary, section 271(d)(3) requires the FCC to make its own judgment whether all of Section 271's statutory requirements have been fulfilled:

> Nor is the Commission obliged to defer to the [state commission's] judgment that SBC satisfied Track A. Although the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight. Unless the FCC concludes to its own satisfaction that the applying BOC has satisfied either Track A or Track B, *as well as the other statutory requirements*, it "shall

> not approve the authorization." 47 U.S.C. section 271(d)(3). *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which holds that matters in connection with intrastate service are "fence[d] off from FCC reach," simply does not apply in this case. Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA [long distance] authorization, and interLATA service is typically *interstate*. For these reasons, we uphold the Commission's determination that SBC's application did not satisfy Track A's requirements.

Id., slip op. at 12-13 (first emphasis added).

The D.C. Circuit's decision is in direct conflict with the Eighth Circuit's analysis of section 271(d)(3). Like the D.C. Circuit's decision, the Eighth Circuit's decision addressed section 271's requirement that "the FCC shall not approve" an application for long distance authorization unless certain conditions are met. The D.C. Circuit decision specifically addressed the condition that an applicant for long distance authorization satisfy Track A or Track B (sections 271(c)(1)(A), (B)), while the Eighth Circuit decision addressed the condition that an applicant meet statutory pricing requirements for access to essential facilities and services (section 271(c)(2)(B)). But while the D.C. Circuit held that "Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for interLATA authorization" and that the FCC is not required "to give the State commissions' views any particular weight" in determining whether the requirements of Track A, Track B, or the "other statutory requirements" have been met, *SBC Communications*, slip op. at 12-13, the Eighth Circuit held that the FCC's section 271(d)(3) authority with respect to critical

pricing issues is restricted to determining whether the relevant state commission believes that the BOC is charging prices that satisfy the federal pricing requirements.

The FCC is thus now subject to two conflicting mandates. The Eighth Circuit has forbidden it to make its own judgment whether a section 271 applicant has satisfied federal statutory pricing requirements and required it instead to accept state commission determinations. But the D.C. Circuit has expressed the contrary (and, we believe, correct) view of the FCC's authority and statutory obligations, and the D.C. Circuit has exclusive jurisdiction to review FCC orders on section 271 applications. See 47 U.S.C. § 402(b)(6, 9). This makes it even more probable that, if the Court does not hear argument on the question in the Fall, the issue will be brought to it thereafter through emergency stay applications. See Petition, pp. 24-25.

For these reasons, and those stated in the petition, the writ of certiorari should be issued and the case should be scheduled to be heard in connection with the petitions that have already been granted arising out of the same case.

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